UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CRIMINAL ACTION NO. 5:06 CR-00019-R

UNITED STATES OF AMERICA **PLAINTIFF**

v.

STEVEN D. GREEN **DEFENDANT**

UNITED STATES' RESPONSE TO
DEFENDANT'S MOTION TO DISMISS

Comes the United States, by counsel, and responds to defendant's Motion to Dismiss.[1] Green argues that the perceived ability of the United States to choose whether Green is tried in federal court or by court-martial is an unconstitutional delegation of legislative authority and violates equal protection and due process. However, given Supreme Court precedent and the statutory framework of MEJA and the UCMJ, the alleged constitutional deficiencies are unsupported and continued prosecution in federal court is appropriate.

I. Facts

On February 16, 2005, Green enlisted in the U.S. Army, 101st Airborne Division, and became subject to the UCMJ. Gov. Ex. 1. In September 2005, Green was deployed to Iraq. Gov. Ex. 2. On April 14, 2006, his Company Commander, CPT John Goodwin, notified Green that Goodwin was initiating action to separate Green from the military for a personality disorder pursuant to Army Regulation ("AR") 635-200 5-13. Gov. Ex. 3. On April 2, 2006, Brigade

[1] The government notes that defendant's 34-page motion does not comply with the Joint Criminal Local Rules. *See* Jt. Ky. Crim. Loc. R. 12.1(e) (supporting memoranda may not exceed twenty-five pages without leave of Court).

Commander, COL Todd Ebel, requested Green's release from theater in Iraq on grounds of a discharge for personality disorder. Gov. Ex. 4. After his arrival at Ft. Campbell, he was administratively out-processed (*see* Gov. Ex. 5) and discharged on May 19, 2006 (*see* Gov. Ex. 1).

According to discovery provided to the defendant, approximately five weeks after Green's discharge, U.S. Army command in Mahmoudiyah, Iraq, first received information that Green was involved in the rape and murder of an Iraqi family in Yousifiyah, Iraq. *See* Stmt. of LTC Thomas Kunk. Green's co-conspirators, who were all still in the Army and subject to the UCMJ, were interviewed by the Army's Criminal Investigation Division and criminally charged on June 6, 2006. Def. Mot. of 02/15/08, Doc. No. 92, Exs. 1-4.

Because Green was a civilian at the time, he was arrested on a federal criminal complaint on June 30, 2006. *See* Arr. Warr. of 06/30/06, Doc. No. 12. He made his initial appearance before Magistrate Judge James Moyer on July 6, 2006.[2] *See* Order of 07/07/06, Doc. No. 6. He was later indicted for 16 counts of conspiracy, aggravated sexual abuse, premeditated murder, and firearm charges pursuant to MEJA, and an additional count of obstruction of justice under 18 U.S.C. 1512(c)(1). *See* Indict. of 11/07/06, Doc. No. 36.

Green's co-conspirators Cortez, Barker, and Spielman, all tried for rape and murder, were convicted by courts-martial. Cortez was sentenced to life without parole while Barker and Spielman were sentenced to life with possibility of parole; all three sentences were reduced pursuant to plea agreements to 100, 90, and 110 years imprisonment, respectfully. Although

[2] Defendant's motion alleges that, in conversation with defense counsel, Assistant United States Attorneys threatened to indict and arrest Spc. Barker in the Western District of Kentucky in order to establish venue in this district. Current counsel of record had no involvement in, or knowledge of, that alleged conversation. It is absolutely clear, however, that with assistance of counsel, Green knowingly, voluntarily, and

charged as principals, none were alleged to have actually murdered Mr. and Mrs. Al-Janabi or their minor daughters. All are eligible for parole in ten years.

Nearly one year after his discharge, Green sought to reenlist. *See* Gov. Exs. 8 and 9. However, because he was discharged for a personality disorder, he is ineligible to reenlist absent a waiver. AR 680-129 1-29. To date, Green has provided no reason to believe that he has resolved his personality disorder or that he could now offer the Army improved military performance.

II. Congress Has Provided Exclusively Civilian Federal Jurisdiction Over Green and His Alleged Offenses.

MEJA extends federal criminal jurisdiction to members of the Armed Forces subject to the UCMJ who engage in conduct outside the United States that would be punishable as a felony if committed in the special maritime and territorial jurisdiction of the United States. MEJA provides:

> Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—
>
> > (1) while employed by or accompanying the Armed Forces outside the United States; or
> >
> > (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice).
>
> shall be punished as provided for that offense.

18 U.S.C. § 3261(a)(1)-(a)(2).

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intelligently waived venue before the Magistrate. Order of 07/07/06, Doc. No. 6, at 1-2.

Although MEJA covers offenses committed by members of the Armed Forces, "[n]o prosecution may be commenced against a member of the Armed Forces subject to [the UCMJ] . . . unless (1) such member ceases to be subject to [the UCMJ]; or (2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to [the UCMJ]." 18 U.S.C. § 3261(d)(1)-(d)(2).

The Supreme Court makes clear that discharged individuals are not subject to the UCMJ. "A soldier who violates military law while a member of the Army, but who is discharged prior to any action being taken with a view toward court-martial, is a civil person and may not be subjected to court-martial jurisdiction." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955). Therefore, because Green is no longer subject to the UCMJ, he is a civilian, and his prosecution in federal court under MEJA is the only appropriate forum.

III. No Legislative Power is Delegated to the Executive Under MEJA.

The defendant argues that MEJA is an unconstitutional delegation of legislative function to the Executive Branch because it grants the Executive discretion to choose whether to prosecute Green under the federal criminal code or the UCMJ. However, MEJA provides no such discretion in this case, and even if it did, Congress has set forth sufficient principles to guide the Executive.

A. Congress Has Defined the Offenses, Punishments, and Adjudicative Procedures Under MEJA.

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. It is well-settled that this provision bestows upon Congress the power to define crimes, determine the range

and types of punishment, and regulate the practice and procedure of courts. *Mistretta v. United States*, 488 U.S. 361 (1989).

In support of his non-delegation argument, Green relies on *Touby v. United States*, 500 U.S. 160 (1991). At issue in *Touby* was an amendment to the Controlled Substances Act, which gave the Attorney General authority to "schedule a substance on a temporary basis when doing so is necessary to avoid an imminent hazard to the public safety." *Id*. at 163 (internal quotations omitted). By designating a substance as a controlled substance, the Attorney General made it a crime to possess, manufacture, or deliver that substance. *Id.* at 162.

Pursuant to the amendment, the Attorney General temporarily designated Euphoria as a Schedule One substance. *Id*. at 164. Thereafter, the defendant was charged with manufacturing the substance. *Id*. Touby challenged the amendment, arguing that Congress unconstitutionally delegated its crime-defining function by providing the Attorney General with authority to temporarily designate a substance as a controlled substance. *Id.* at 164-65.

The Supreme Court rejected Touby's argument. "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Id.* at 165. Rather, Congress must simply lay down "an intelligible principle to which the person or body authorized to act is directed to conform." *Id.* (brackets omitted). While an argument was made in *Touby* that "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions," the Court

did not resolve that issue, simply finding that even if something more was required, the amendment provided whatever more could possibly be necessary. *Id.* at 165-66.

Unlike *Touby*, this case does not involve any delegation of legislative function to the Executive branch: (i) MEJA defines the elements of the offense and leaves no room for further definition (s*ee* 18 U.S.C. § 3261(a)); (ii) MEJA defines the offense punishment (*see id*.); and (iii) those charged with violations under MEJA are adjudicated under the Federal Rules of Criminal Procedure (*see* Fed. R. Crim. P. 1(a)(1)), and MEJA-specific procedural rules, all of which are prescribed under Congress's authority.[3]

This case is more properly analogized to *United States v. Batchelder*, 442 U.S. 114 (1979).[4] In *Batchelder*, Congress passed two laws with substantially similar provisions making it illegal for a felon to possess a firearm. *Id.* at 116-17. The primary difference between the offenses was that one carried a maximum punishment of two years' imprisonment, while the other carried a maximum punishment of five years' imprisonment. *Id.* The defendant was indicted and prosecuted for the offense that carried the five-year maximum punishment. *Id*. at 116.

On appeal, the Court of Appeals "postulated that the statutes might impermissibly delegate to the Executive Branch the Legislature's responsibility to fix criminal penalties." *Id.* at 125. However, the Supreme Court rejected this argument and reversed, stating that the "provisions at issue plainly demarcate the range of penalties that

[3] For MEJA-specific rules of procedure, *see, e.g.*, 18 U.S.C. § 3262 (arrest and commitment procedures); 18 U.S.C. § 3263 (transfer of defendants to foreign authorities); 18 U.S.C. § 3264 (limitations on removal); 18 U.S.C. § 3265 (initial proceedings).

[4] Indeed, *Batchelder* more closely approximates Green's non-delegation argument, which defendant claims has the result of "disparate sentences [being] imposed . . . in factually identical cases involving identically situated defendants at the whim of the executive." Mot. to Dismiss, Doc. No. 92, at 17.

prosecutors and judges may seek and impose. In light of that specificity, the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws." *Id.* at 126. Furthermore, by "inform[ing] the courts, prosecutors, and defendants of the permissible punishment alternatives," Congress fulfilled its legislative responsibility to fix criminal penalties. *Id*.

As in *Batchelder*, when Congress passed MEJA, it clearly informed courts, prosecutors, and defendants of the elements of the offense and the range of penalties. Congress also declared who is subject to the law: MEJA defines who may be prosecuted under the federal criminal code (*see* 18 U.S.C. § 3261) and Title 10 defines who is subject to the UCMJ (*see* 10 U.S.C. § 802). Because MEJA leaves no legislative function to the Executive, all that is left is the enforcement of the law, which is the quintessential responsibility of the Executive.

B. Congress Has Provided Sufficient Principles to Guide the Executive's Prosecutorial Discretion.

Even if a court were to hold that MEJA provides a delegation of legislative power, Congress has set forth sufficient principles to guide the Executive. The UCMJ defines who is subject to its provisions (10 U.S.C. § 802), and MEJA limits prosecution to individuals no longer subject to UCMJ or to those who committed the crime with another who is not subject to the UCMJ (18 U.S.C. § 3261(d)). Moreover, the Supreme Court is clear that civilian ex-servicemembers who have been separated from the military cannot constitutionally be subjected to trial by court-martial, even for crimes they committed while still in the military. *Quarles*, 350 U.S. at 23. Within these statutory and

constitutional confines, the Executive is sufficiently guided in making its decision to present the case to a federal grand jury or seek charges under the UCMJ.

Furthermore, if the government had a choice to prosecute the defendant under the UCMJ or MEJA, as the defendant assumes, this is not a legislative responsibility and would not be prohibited by the non-delegation principle. Rather, the Executive is simply choosing how best to enforce the laws of the United States. *See United States v. Crayton*, 357 F.3d 560, 571-72 (6th Cir. 2004) (holding that a prosecutor's decision to seek a mandatory enhanced penalty under 21 U.S.C. § 851 for prior convictions was not an unconstitutional delegation of legislative powers to set criminal penalties since "[s]uch discretion is an integral feature of the criminal justice system"). Additionally, the Supreme Court "has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *Batchelder*, 442 U.S. at 123-24. "[T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements." *Id.* at 124-25.

III. Green's Equal Protection Claim Fails to Rebut the Prosecution's Presumption of Regularity and Does Not Prove that the Challenged Prosecutorial Decision Had a Discriminatory Effect and Purpose.

The defendant argues that his prosecution violates equal protection.[5] Specifically, Green apparently considers himself a class of one denied equal protection because

[5] The defendant also maintains a denial of equal protection under the law with regard to fundamental rights. However, Green does not mention what fundamental rights were violated nor can the government perceive of any such violation.

similarly-situated individuals – his co-conspirators – were subjected to prosecution in the military and punished with greater leniency than he expects in federal court.[6] Although Green does not call it such, he is making a selective prosecution claim.

However, the government's decision to prosecute is supported by the "presumption of regularity," and "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *Id.* (internal quotations omitted). Nonetheless, a prosecutor's discretion is "subject to constitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

To make a selective prosecution claim, the defendant must provide clear evidence that the challenged prosecutorial decision was based on an unjustifiable standard such as race, religion, or other arbitrary classification. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Furthermore, Green "must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose." *Id*. at 465. Furthermore, the Sixth Circuit requires a criminal defendant in this situation to "demonstrate that a government actor had a bad reason for enforcing the law against [him] and not against a similarly situated party," or that the "actor had no reason at all – that the action had no rational basis." *Boone v. Spurgess*, 385 F.3d 923, 932 (6th Cir. 2004).

[6] The Supreme Court does not share the views that form defendant's preference for court-martial prosecution. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) (stating that "it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts"). Furthermore, defendant is mistaken that there are no mandatory minimum sentences under the UCMJ. Premeditated murder and felony murder are death penalty offenses and carry a mandatory minimum of life with the possibility of parole. *See* 10 U.S.C. § 918. Indeed, Cortez was sentenced to life without parole, and Barker and Spielman were sentenced to life with possibility of parole. Those sentences were only reduced because of their pre-trial agreements.

A. Green Fails to Present Evidence that He Was Prosecuted Based On An Unjustifiable Classification Like Race, Religion, or Other Arbitrary Standard.

Green does not claim that he is being prosecuted in federal district court, as opposed to a military court-martial, because of his race or religion. Additionally, he presents no evidence or even argument that he is being prosecuted based on some other arbitrary classification. Indeed, the prosecution of the defendant in federal court as opposed to court-martial is *constitutionally mandated*, and therefore cannot be arbitrary. *Quarles*, 350 U.S. at 23 (holding that civilian ex-servicemembers who have been separated from the military cannot constitutionally be subjected to trial by court-martial, even for crimes they committed while still in the military).

B. Green Presents No Evidence of Discriminatory Purpose, Discriminatory Effect, or Irrational Basis.

Likewise, Green makes no argument nor offers any evidence to show that his prosecution in federal court has a discriminatory effect or was motivated by a discriminatory purpose. Green does not even attempt to speculate why he is being prosecuted federally, merely stating that "for whatever reason, benign or sinister," the government chose to prosecute him in federal district court. (Mot. to Dismiss, Doc. No. 92, at 26). But even if the reason was sinister and constituted a "bad reason" under *Boone v. Spurgess*, the decision to prosecute him in federal court has a rational basis. Namely, Green was the only co-conspirator not subject to the UCMJ at the time of his arrest. He was a civilian at the time and could not constitutionally be subjected to trial by court-martial. *Quarles*, 350 U.S. at 23; R.C.M. § 202(a)(2)(B)(iii).

Green points out the fact that he sought voluntary reenlistment in order to subject himself to the UCMJ. But this does not meet the defendant's burden of presenting clear evidence to rebut the presumption of prosecutorial regularity. The Army had no duty to accept Green's reenlistment. He was separated on a personality discharge that made him ineligible for reenlistment without a waiver. AR 680-29 1-29. And Green has not provided grounds for a waiver by providing evidence that his personality disorder has been rehabilitated or that his performance as a soldier would continue to be anything other than "poor," as noted by his platoon commander. *See* Gov. Ex. 3.

Furthermore, the Army was not bound to accept his reenlistment for the sole purpose of trying him by court-martial. Defendant cites no rule, regulation, or practice to support that idea. Nor is the Army bound to accept his reenlistment in order to give effect to Green's personal preference that he be tried by court-martial. Certainly, Green has no discretion in such a matter.

IV. Green's Discharge Did Not Violate Procedural Due Process Because Green Did Not Have a Liberty or Property Interest in Continued Military Service.

The defendant argues that he was denied procedural due process. Although it is not clear which procedures he finds lacking, presumably, Green is arguing that the manner in which he was discharged from the Army violated due process. However, the defendant had no liberty or property right in continued military service, and, even if he did, the Army's procedures satisfied due process.

The Fifth Amendment of the U.S. Constitution provides, in part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law." "Procedural due process imposes constraints on governmental decisions which deprive

individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Guerra v. Scruggs*, 942 F.2d 270, 277 (4th Cir. 1991) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)). To prevail on a procedural due process claim, the defendant "must first establish that he has a property or liberty interest." *Id.*

The defendant does not address whether he actually had a property or liberty interest in continued Army service, but rather assumes that such an interest existed. *See* Mot. to Dismiss, Doc. No. 92, at 29 and 32 (analogizing Green to a criminal defendant with a liberty interest in his juvenile status, *citing State v. Skakel*, 276 Conn. 633, 658, 888 A.2d 985, 1007 (Conn. 2006)). However, "enlisted member[s] of the armed forces do[] not have a property interest in [their] employment." *Canonica v. United States*, 41 Fed. Cl. 516, 524 (1998); *Guerra*, 942 F.2d at 278.

On the other hand, an enlisted member on the armed forces may have a liberty interest in certain circumstances. "This liberty interest prevents the military from discharging a service member without due process – but only in cases where a 'stigma' would attach to the discharge." *Canonica*, 41 Fed. Cl. at 524. In this case, Green does not argue that stigma has attached because of his discharge. Indeed, the defendant was given an honorable discharge. Certainly there is no stigma in that.

The defendant could possibly argue that stigma *could* attach because of the reason for his separation – a personality disorder – but he has not made that argument. Even if he did, he would have to show that the reason for the discharge was false. The falsity of a government's reason for the discharge is a "critical element of the claimed invasion of a

reputational liberty interest." *Guerra*, 942 F.2d at 278. Thus, where the defendant fails to "show that the stated reason for his discharge . . . was untrue," there can be no liberty interest. *Id.* Here, the defendant has failed to make that showing, and he therefore had no liberty interest in continued service with the Army.

But even if Green had a liberty interest, his procedural due process rights were not violated. AR 635-200 provides procedural requirements relating to the discharge of personnel. In Green's case, the Army followed the "notification procedure" – Green's platoon commander notified him of the intended separation action and informed Green of his opportunity to consult with counsel, submit statements on his own behalf, and obtain copies of documents supporting the proposed separation. *See* Gov. Ex. 3, at 2; AR 635-200 2-2. Furthermore, Green received his final pay and proper discharge paperwork and he completed the Army's administrative out-processing procedures.[7] From the beginning of his commander's notification of intended separation proceedings to his receipt of his discharge certificate, there is no evidence to suggest that Green ever invoked his rights and protested his separation. In such a case, the Army's separation procedures did not violate procedural due process. *See Holley v. United States*, 124 F.3d 1462 (Fed. Cir. 1997) (discharge procedures did not violate due process where Army provided individual written notice of intended separation and opportunity to submit written statement).

The defendant did not have a property or liberty interest in continued employment with the Army, and therefore was not entitled to procedural due process protections. Even if he did have a liberty interest, the Army's procedures met the requirements of

[7] The propriety of the Army's administrative out-processing procedures is discussed in the government's

procedural due process. Additionally, the defendant does not have a fundamental liberty interest in being subject to trial by court-martial. Thus, the Army's actions in discharging him merely need to bear a reasonable relation to a legitimate governmental interest. Clearly, the Army's discharge of a soldier with a personality disorder which renders him unfit to serve in the military is reasonably related to the government's legitimate interest in maintaining an Army fit for combat. Defendant's procedural due process argument should be rejected.

V. The Defendant's Substantive Due Process Rights Were Not Violated Because Green Does Not Have a Fundamental Right to Be Tried by Court-Martial.

The defendant argues that his substantive due process rights were violated because his prosecution in civilian court constitutes the "height of arbitrariness" as the government "orchestrated" all matters leading to his civilian trial. Mot. to Dismiss, Doc. 92, at 29. However, Green fails to define exactly what right he is claiming – presumably it is a fundamental right to be tried by court-martial. But again, this ignores the Supreme Court's decision in *United Stats ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

The substantive component of the Fifth Amendment's Due Process clause "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). However, "narrow tailoring is required only when fundamental rights are involved." *Id*. at 305. If there is no fundamental right involved, the government action must simply bear a reasonable

relation to a legitimate governmental interest. *See id*. at 306; *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

To determine if an asserted right is fundamental, a court must consider two factors: (i) whether the asserted right is "deeply rooted in this Nation's history and tradition," and (ii) whether the asserted right is "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21 (internal quotation marks and citations omitted). Further, in substantive due process cases, the Supreme Court "require[s] . . . a careful description of the asserted fundamental liberty interest." *Id*. at 721 (internal quotation marks omitted).

The "list of fundamental rights is short," *Seal v. Morgan*, 229 F.3d 567, 575 (6th Cir. 2000), and includes "the right to marry, the right to have children, the right to direct the educational upbringing of one's child, the right to marital privacy, the right to use contraception, the right to bodily integrity [and] the right to abortion" *Blau v. Fort Thomas Public School District*, 401 F.3d 381, 393 (6th Cir. 2005) (*citing Glucksberg*, 521 U.S. at 720). The Supreme Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992). The Court "must therefore exercise the utmost care whenever [it is] asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the] Court." *Glucksberg*, 521 U.S. at 720 (internal citations and quotations omitted).

While the defendant does not state what fundamental right is actually at issue, it would appear that Green argues that he has a fundamental liberty interest in being subjected to prosecution by court-martial for crimes committed while he was in the military, instead of being prosecuted in the federal civilian court system. Then, according to defendant's argument, that right was violated when the government's arbitrary decision to discharge him from the Army – after the offenses for which he was on trial were committed – gave the government the grounds to prosecute him under MEJA.

If a fundamental right was actually at issue in this case, the Supreme Court has made it clear that the right is actually opposite of what defendant claims it to be. In *Quarles*, rather than finding a constitutional right to be subject to court-martial jurisdiction, the Court found that it violates the Constitution to subject an ex-servicemember to trial by court-martial, even for crimes committed while the defendant was in the military. *See Quarles*, 350 U.S. at 23. If it violates the Constitution to try former members of the military by court-martial, even for crimes committed while the defendant was in the military, Green can have no right in being subjected to trial by court-martial. Likewise, given Quarles, Green cannot claim that the right to court-martial is "deeply rooted in this Nation's history and tradition" or that it is "implicit in the concept of ordered liberty." 521 U.S. at 720-21

Because Green has no fundamental right to trial by court-martial, the contested government action must bear a reasonable relation to a legitimate governmental interest. Reno, 507 U.S. at 302. The United States clearly has a legitimate governmental interest

in ensuring that its soldiers are fit to serve in the United States Army. Our nation's security and safety literally depends upon the fitness of the Army's soldiers. The question thus becomes whether the discharge of the defendant bears a reasonable relation to this legitimate, indeed compelling, governmental interest.

The defendant's argument implies that he was discharged solely so he could be tried in federal civilian court as opposed to court-martial. But he presents no evidence to support this, and in fact, it misrepresents the defendant's own timeline of events. *See* Mot. to Dismiss of 02/15/08, Doc. No. 92-6, Ex. 5. The crimes of indictment allegedly occurred on March 12, 2006 (*id*.); Green was discharged from the U.S. Army on May 16, 2006 (*id*.); Green's former chain of command was put on notice of possible U.S. involvement in the Yousifiyah offenses in June 2006 (*id*.); and Green's co-conspirators were charged on July 8, 2006, almost 2 months after Green's separation (*Id*., Exs. 1-4). Therefore, the defendant's own timeline of events indicates that Army personnel with authority to prosecute the defendant for crimes under the UCMJ were not aware of his involvement until *after* his discharge. The defendant has made no argument denying his personality disorder, or claimed that he should have been allowed to remain in the Army despite his personality disorder, or that his military performance would continue to be anything but poor. Clearly, the discharge of the defendant was reasonably related to the Army's interest in maintaining an Army ready to fight wars and protect our country.

V. Conclusion

MEJA delegates no legislative authority to the Executive. Rather, Congress has defined the offenses, punishments, and all adjudicative procedures required for Green's prosecution.

Defendant's equal protection claim should be dismissed because Green fails to rebut the prosecution's presumption of regularity and prove a discriminatory effect and purpose of the challenged prosecutorial policy. Green's procedural and substantive due process claims are also unconvincing because Green does not have a liberty or property interest in continued military service or a fundamental right to be tried by court-martial.

WHEREFORE, the United States respectfully requests that this Court deny defendant's Motion to Dismiss for Lack of Jurisdiction.

Respectfully submitted,

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s/ .

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CERTIFICATE OF SERVICE

I certify that on March 21, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Scott T. Wendelsdorf, Federal Defender, Patrick J. Bouldin, Assistant Federal Defender, and Darren Wolfe, Attorney at Law, counsel for defendant, Steven D. Green.

s/ .
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